FILED
JUN 21 1954
HAROLD B. WILLEY, C

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954

No. 152

IRA W. JAYNE, CHESTER P. O'HARA, ET AL., JUDGES OF THE CIRCUIT COURT FOR WAYNE COUNTY, ET AL.,
Appellants,

vs.

CITY OF DETROIT, JOHN H. WITHERSPOON, CONTROLLER; JAMES A. HOYE, DEPUTY COMMISSIONER AND DIRECTOR OF TRAFFIC OF THE POLICE DEPARTMENT OF THE CITY OF DETROIT

APPEAL FROM THE SUPREME COURT OF THE STATE OF MICHIGAN

STATEMENT AS TO JURISDICTION

GEORGE E. BRAND,
GEORGE E. BRAND, JR.,
3709 Cadillac Tower,
Detroit, Michigan,
Counsel for Appellants.

INDEX

Subject Index

	Page
Statement as to jurisdiction	1
Statute believed to sustain jurisdiction	2
Statutes of State involved	2
Nature of the case—Circuit Court suit	4
Supreme Court—Prohibition—Mandamus	9
Date of judgment sought to be reviewd and date of presentment of application for appeal	12
Questions are substantial	16
Appendix "A"—Opinion of the Supreme Court of Michigan	20

Table of Cases Cited

Beard v. *City of Alexandria,* 341 U.S. 622, 71 S.Ct. 920, 95 L.ed. 1233	13
Chicago, etc., R. Co. v. *Illinois,* 200 U.S. 561, 26 S.Ct. 341, 50 L.ed. 596	14
City of Detroit v. *Wayne Circuit Judge,* 339 Mich. 62	11
Crew Levick Co. v. *Commonwealth of Pennsylvania,* 245 U.S. 292, 38 S.Ct. 126, 62 L.ed. 295	14
Jamison v. *State of Texas,* 318 U.S. 413, 63 S.Ct. 669, 87 L. ed. 869	13
John P. King Manufacturing Co. v. *City Council of Augusta,* 277 U.S. 100, 48 S.Ct. 489, 72 L.ed. 801	13
Winters v. *New York,* 333 U.S. 507, 68 S.Ct. 665, 92 L.ed. 840	14

Statutes Cited

	Page
Act 286, Section 1, Michigan Public Acts, 1947, Vol. 1, Michigan Compiled Laws 1948, Sec. 141.161	3
Constitution of the United States, 14th Amendment	
Detroit City Ordinance No. 672-E, effective August 9, 1952, as amended by Detroit City Ordinance No. 804-E, effective December 10, 1953	2, 3
Michigan Revenue Bond Act of 1933 (Act 94, Michigan Public Act 1933, as amended), Vol. 1, Michigan Compiled Laws 1948, Sections 131.101-141.138	2
United States Code, Title 28:	
Section 1257	2
Section 2103	16

BLEED THROUGH POOR COPY

SUPREME COURT OF MICHIGAN

No. 46054

CITY OF DETROIT, JOHN H. WITHERSPOON, Controller, and JAMES A. HOYE, Deputy Commissioner and Director of Traffic of the Police Department, of Said City of Detroit,

Plaintiffs,

vs.

IRA W. JAYNE, CHESTER P. O'HARA, ET AL., Judges of the Circuit Court for Wayne County, Michigan; SERVICE PARKING GROUNDS, CIVIC CENTER GARAGE, INC., MADISON PARKING CO., PARKING REALTY COMPANY, PARKING INVESTMENT CORPORATION, PARK PLACE CORPORATION, THEATRE PARKING, INC., UNION PARKING COMPANY, INCORPORATED (All Michigan Corporations); JOSEPH FEE and BEULAH FEE, Copartners as Willis Parking Co.; JOSEPH M. JOSEPH, d/b/a Adams Parking Co.; HYMAN MILLER and TILLIE MILLER, Copartners as Jefferson Parking; SIDNEY POZEN, d/b/a Sidmar Parking Co.; GEORGE SALLOUM, d/b/a Fox Parking Co.; GEORGE RASHID, d/b/a Bagley Parking Co.; SAMUEL C. BINKOW, M. BERTHA BINKOW, JOSEPH KATCHKE and IRMA J. KATCHKE, Copartners as Briggs Parking, and LOTTIE FELDMAN,

Defendants

JURISDICTIONAL STATEMENT BY APPELLANTS

Appeal by private owners and operators of off-street automobile parking garages and lots from a final judgment

of the Supreme Court of Michigan prohibiting further proceedings in appellants' pending suit, against the appellees City of Detroit and its Controller, in the Circuit Court for Wayne County, Michigan, in Chancery, for injunction and declaratory relief respecting the City's acquisition, operation, maintenance and financing of competing off-street automobile parking facilities claimed by the City to be authorized by certain Michigan statutes, city ordinances and the city charter.

I

Statute Believed to Sustain Jurisdiction

28 USC § 1257, which provides that final judgments rendered by the highest court of a state in which a decision could be made may be reviewed by the Supreme Court of the United States (2) by appeal, where is drawn in question the validity of the statute of a state on the ground of its being repugnant to the Constitution of the United States, and the decision is in favor of its validity.

II

Statutes of State Involved

Michigan Revenue Bond Act of 1933 (Act 94, Michigan Public Act 1933, as amended), Vol. 1, Michigan Compiled Laws 1948, §§ 141.101-141.138, implemented by *Act 286, § 1, Michigan Public Acts 1947,* Vol. 1, Michigan Compiled Laws 1948, § 141.161.

Detroit City Ordinance No. 672-E, effective August 9, 1952, as amended by Detroit City Ordinance No. 804-E, effective December 10, 1953.

The Revenue Bond Act relates to the acquisition, etc. of "public improvements" by public corporations and the financing thereof by the issuance of revenue bonds (pursuant to definitive ordinance) which shall be payable solely

BLEED THROUGH POOR COPY

from the resulting net revenues. Pertinent provisions of the Act are those which define the term "public improvements" to mean and be limited to, *inter alia*, "automobile parking, and terminal facilities," and the term "net revenues" to mean the revenues of any public improvement remaining after deducting the reasonable expense of administration, operation and maintenance thereof, and provide that two or more public improvements may be operated as one improvement and that the revenues thereof may be pledged to defray the cost of acquisition, construction, operation and maintenance thereof and the principal and interest of the bonds, for which payment the ordinance shall create a lien upon the net revenues pledged, enforceable by receivership, etc., but not by compulsory sale.

Said Act 286, § 1, Michigan Public Acts 1947, implemented the Revenue Bond Act by authorizing cities to acquire, improve, and operate automobile parking facilities for the use of the public and to finance the same under the Revenue Bond Act, but provided that such facilities shall not be exempt from taxation if a fee is charged for their use.

The two Detroit City Ordinances are printed in full in the record.[1] Pertinent provisions thereof are those which provide that after January 1, 1954, all existing and future on-street parking spaces for which a fee or charge is collected by parking meters, two already acquired off-street parking lot facilities (known as Joy Road and Seven Mile Road), all off-street parking facilities authorized by ordinance to be acquired and constructed, together with on-street and off-street parking meters shall be "maintained and operated" by the City as an automobile parking system (R. 55-56); that the City issue, under the Revenue Bond Act, $2,400,000, 30 year, interest-bearing, revenue bonds for the financing of two initial off-street garages (R. 56); that additional bonds,

---

[1] R. 21-51 as to No. 672-E, and R. 51-72 as to No. 804-E.

of equal standing, may be issued for the acquisition and construction of other parking facilities (R. 49); that the terms "revenues" and "net revenues" shall mean as defined in the Revenue Bond Act (R. 57); that the parking fees for on-street and for off-street parking shall be fixed and revised from time to time as may be necessary to produce the amounts required to pay the expenses of operating and maintaining the system and the bond principal and interest when due (R. 60-61), for the security of which a statutory first lien upon the net revenues of the system is created (R. 31, 43), the City covenanting and agreeing at all times to fix, maintain and collect such parking fees sufficient for said purposes (R. 60), and that the City will maintain parking meters, enforce parking regulations and thereby collect rates as required by the ordinance on all public streets where such meters are presently or hereafter located, until the principal and interest of the bonds are paid, changes in location of the meters necessary because of street widenings or closings or to meet other traffic control requirements, not materially lessening the income and revenues of the system, excepted (R. 42-43).

III

Nature of the Case—Circuit Court Suit

On December 15, 1953, Service Parking Grounds and the other appellants, as plaintiffs, filed their said bill of complaint (R. 74-151) in the Circuit Court for the County of Wayne, Michigan, in Chancery, against the appellees alleging: the extent of appellants' off-street automobile parking garages and lots, and their large investments therein, in downtown Detroit; the City's plan to construct, own, operate, on a fee-charge basis, and maintain, upwards of 30 off-street automobile parking garages and other facilities upon

POOR COPY

lands acquired and to be acquired by the City, in and near downtown Detroit, and to finance the cost of such acquisition, construction, operation and maintenance by revenue-bond financing under said Michigan Revenue Bond Act of 1933 as amended, *ante*, and under and as provided in Detroit City Ordinances No. 672-E, and No. 804-E, *ante;* that said ordinances provide for the immediate construction of two of said garages, and for open-end financing thereof and of other parking facilities contemplated by said plan; that there was and is no shortage of off-street automobile parking facilities in downtown Detroit or nearby areas; that for years the City has, by meter collections for on-street parking, collected, and is continuing to collect, large sums in excess of the cost of such meters and the cost of operating and regulating them; that said ordinances provide for the use of the parking meter collections for the purposes of acquisition, construction, operation and maintenance of the City off-street parking facilities and obligate the City to continue on-street parking in downtown Detroit regulated by meters then and thereafter installed and thereby to collect sufficient to pay the principal and interest on the revenue bonds, and the expenses, administration and operation of the facilities; that the City's Counsel had advised the City that off-street parking facilities owned or operated by it are exempt from taxation, and that two off-street City acquired parking facilities acquired by such use of meter collections already in operation were not being taxed by the City; that the effect of the City's off-street parking plan was and will be unlawful and unfair competition with appellants' parking businesses and, *inter alia*, that the same and the provisions of the ordinances contracting to continue present and future on-street parking and excessive meter collections therefor and the use of such collections for purposes of City owned, operated and maintained off-street parking

garages and other parking facilities, was and will be in violation of the rights of the appellants guaranteed by the Constitution of the United States.

In paragraph 30, divisions (1)-(4), (a)-(c), of their said bill of complaint (R. 129-131) appellants also alleged that: parking meters then or thereafter used in connection with on-street automobile parking were not and are not a "public improvement" within the intendment, contemplation or scope of the Revenue Bond Act, and that income, fees or charges collected by such meters are not "revenue" usable for the acquisition, construction, operation or maintenance of off-street automobile parking facilities; that neither the two initial off-street garages nor any of the garages or other facilities contemplated to be financed by the Ordinances are or will be operable as a self-liquidating public improvement within the contemplation of said Act and, therefore, may not be combined with others thereunder; that said Act does not provide or contemplate that excessive on-street parking meter moneys collected by the City may be used for off-street parking purposes, but if it does, the provisions of said Act, so providing or contemplating, not only exceed the rights of the City in the streets under the Michigan Constitution but exceed the granting power of the legislature, and that:

> 4(c) "The result of granting, directing or authorizing the City to use said parking meter money for off-street automobile parking facilities and also the result of the exercise of such power by the City, will be to deny plaintiffs, and each of them, [of] the equal protection of the laws and to deprive them of their and each of their property without due process of law, contrary to the Fourteenth Amendment to the Constitution of the United States (R. 130-131) and to Article 2, Sections 1 and 16 of the Constitution of the State of Michigan, and also to take the properties and businesses of plaintiffs and each of them for public use without the neces-

POOR COPY

sity therefor being first determined and compensation therefor made or secured in the manner prescribed by law, contrary to Article 13, Section 1, of the Constitution of the State of Michigan" (R. 131).

In paragraph 31 of their bill of complaint (R. 131-133) appellants also alleged that: said Ordinances Nos. 672-E and 804-E, and in any event, the portions thereof pertaining to the use and pledging (for off-street automobile parking purposes) of money collected by parking meters as to on-street parking, and as to the parking meter rates, charges and fees, and the location and continuance of present and future street parking meters, are unconstitutional, illegal and void for each of the reasons set forth in divisions (1), (2), (3) and (4) of paragraph 30 of said bill of complaint, *ante*, relating to the Revenue Bond Act, and for the additional reasons that the City lacks the right to acquire, etc., off-street parking facilities because of lack of necessity therefor and because the existing facilities are adequate, that requiring 5 cent meter deposit unreasonable, excessive and illegal, that permitting and contracting to continue downtown and other on-street parking, both as to such parking and as to the amount of money to be derived therefrom, is and will be an unreasonable, illegal and improper regulation and control of the streets and an unwarranted and improper interference with appellants' rights to the use of the city streets for travel and a violation of the City's duty to protect and preserve such rights, that the continuation of improper and illegal exactions by meters for on-street parking to be devoted to off-street parking purposes will be in wrongful, illegal and unfair competition with appellants and others engaged in furnishing off-street parking facilities, and that said ordinances are unjust, unreasonable, illegal and discriminatory class legislation and attempt to confer upon the City powers which it cannot constitutionally or legally exercise and to commit it to obligations as to on-

street parking meter collections that are beyond the City's power constitutionally or legally to incur.

In their bill of complaint (R. 134-137) appellants prayed for a judicial declaration and determination of the several questions raised by them, for decree that the on-street parking meters are not public improvements within the Revenue Bond Act and that such meters cannot constitutionally or legally be combined with, nor can money collected thereby be used for, off-street parking facilities; that no off-street parking facility acquired, owned or operated by the City not reasonably capable of producing net revenue adequate to pay the cost thereof, is a proper subject of revenue-bond financing; that the two ordinances and the financing therein provided for is invalid; that the City cannot legally collect for on-street parking more than the reasonable cost and expense of regulating such parking nor sums which produce substantial profit or revenue to the City by reason of such meters; that off-street parking facilities acquired, constructed, maintained or operated by the City are not and cannot be exempt from taxation by the City, and that a temporary and permanent injunction issue restraining consummation of the proposed financing, the use of meter collections for off-street parking purposes, and the contracting to maintain present and future meter collections for on-street parking sufficient to pay the bonds, interest and other items contemplated by the ordinances. General relief was also sought. No temporary injunction or restraining order was issued.

Personal service of summons and of copy of the bill of complaint was made on each of appellees-defendants on December 15, 1953, and proof thereof was filed. On December 30, 1953, the appellees (as defendants) without special appearance, filed, and on December 31, 1953, served their motion (R. 222-223) to dismiss the bill of complaint on grounds that appellants were not proper parties plaintiff and not

POOR COPY

entitled to bring the suit, that the bill of complaint states no cause of action nor ground for equitable relief, and that the court lacks jurisdiction of the plaintiffs or subject matter. This motion was not noticed for hearing nor was it heard or determined.

Supreme Court—Prohibition-Mandamus

On December 31, 1953 appellees filed in the Supreme Court of Michigan, as an original proceeding, their petition for writ of prohibition and mandamus against the Judges of the Circuit Court of Wayne County, Michigan, and appellants, prohibiting them from continuing with, and requiring them to discontinue, the Circuit Court suit (R. 1-192). Attached to the petition, as Exhibits, were copies of Ordinances Nos. 672-E and 804-E (R. 21-72), and of appellants' Circuit Court bill of complaint (omitting the exhibits thereto) (R. 73-148), and 39 newspaper articles and editorial favoring the City off-street parking plan and ertical of opposition thereto (R. 153-192).

In said petition appellees alleged that the Circuit Court was wholly without jurisdiction to consider and determine the litigation in that court for the reason that appellants, as plaintiffs therein, have no litigible interest in the matter either as residents, taxpayers or so-called competitors, no tax moneys, and no competition being involved inasmuch as the City is not operating a business but is performing a police power function. Appellees also alleged that all of the questions presented in the bill of complaint had been settled by decisions of the Supreme Court of Michigan in prior cases between other parties. Upon the filing of this petition the Supreme Court issued an *ex parte* order on December 31, 1953, returnable January 12, 1954, requiring the Wayne Circuit Court Judges and appellants to show cause before the Court on January 14, 1954, why prohibition and/or mandamus should not issue (R. 226).

Responses to the order to show cause (including answers to the petition) were filed on January 12, 1954, by the Judges (R. 193-196) and by appellants (R. 197-219). In paragraph 2(a), (b) and (c) of appellants' response (R. 198-199) they asserted that the subject matter was within the invoked jurisdiction of the Circuit Court and not within the jurisdiction of the Supreme Court and

> "(c) To prohibit the individual respondents from taking any further proceedings in their Circuit Court cause and to require them to discontinue said cause, would be to deny them, and each of them, the equal protection of the laws, and to deprive them of their and each of their property without due process of law, contrary to the Fourteenth Amendment to the Constitution of the United States and also to Article 2, §§ 1 and 16 of the Constitution of the State of Michigan, and would also take the properties and businesses of the individual respondents and of each of them, for public use without the necessity thereof being first determined and just compensation therefor being made or secured in manner prescribed by law, contrary to Article 13, § 1 of the Constitution of the State of Michigan."

In paragraph 3(a)-(e) of said response (R. 199-200) appellants alleged that if the Supreme Court had jurisdiction, the petition should nevertheless be denied for the foregoing reasons and

> "(c) If the facts alleged in said Circuit Court bill of complaint are not to be deemed admitted, or are deemed to be challenged by the allegations of the petition herein, said allegations are denied and controverted in the subsequent paragraphs of this response and the taking of a large amount of testimony will be required, which is the respondents' right to take as to the issues of fact thus created, before final decisions by this Court can or should be made. To deny respondents such right would be to deny them the equal protection of the laws

and to take their property without due process of law, contrary to the applicable provisions of the Constitutions of the United States and of the State of Michigan referred to in division (c) of paragraph 2 of this response, ante."

In paragraphs 4-25 (R. 201-219) appellants controverted the allegations of the petition and added the further contentions that the provisions of the Ordinances as to continued on-street parking and meter collections therefor were in violation of Michigan statute giving the State Highway Commissioner and the Wayne County Road Commission, respectively, control of many of the main streets in Detroit; that under the Michigan Home Rule Act and the City Charter the off-street facilities must be operated on a self-liquidating and "utility" basis; that as to two City owned and operated off-street parking facilities the provisions of the City charter requiring special benefit assessments against adjoining property were not being complied with and said facilities were not being taxed as required by Act 286, § 1, Public Acts Mich. 1947. Respondents denied that previous decisions of the Supreme Court between other parties were determinative or conclusive as to them. Appellants' response concluded:

"25. Respondents further allege that the petition herein states no sufficient or proper grounds for issuance of the writs prayed and that, therefore, and for the reasons alleged by respondents in the Circuit Court bill of complaint and in the responses filed herein, said petition should be denied."

Printed briefs were filed, and oral argument in the Supreme Court was had on January 14, 1954. On February 18, 1954 written opinion was filed by the Court, *City of Detroit* v. *Wayne Circuit Judges*, 339 Mich. 62, copy of which is hereto attached, pages 247-254.

IV

Date of Judgment Sought To Be Reviewed and Date of Presentment of Application for Appeal

Judgment of the Supreme Court of Michigan was entered on February 18, 1954. Appellants on March 4, 1954 seasonably filed their application for rehearing which was considered and denied by final order of the Court entered April 6, 1954, which is the date of the final judgment sought to be reviewed. Appellants' application for appeal was presented to Honorable Henry M. Butzel, Chief Justice of the Supreme Court of Michigan, on May 18th, 1954 and was allowed.

The grounds alleged by appellants for such rehearing were that:

> "I. Jurisdictionally, substantively and procedurally, the decision and judgment herein that writs of prohibition and mandamus should issue deny said respondents, and each of them, equal protection of the laws and due process of law, contrary to the Fourteenth Amendment to the Constitution of the United States.
>
> "II. Said decision and judgment deprive said respondents of their and each of their property without due process of law, contrary to said Fourteenth Amendment.
>
> "III. Regardless of the foregoing, the decision is prejudicially erroneous in important matters."

Implementing their contentions that they had been denied constitutional rights appellants alleged that the subject matter was within the jurisdiction of the Circuit Court to which jurisdiction the appellees had submitted; that appellants had a right to a hearing, trial and determination of the issues of fact and of law in the circuit court in accordance with the prescribed constitutional and statutory procedure, including the right to amend their complaint and to offer and

BLEED THROUGH POOR COPY

take testimony and submit proofs, subject to no control by the Supreme Court other than on a proper appeal from an order or decree by the Circuit Court; that the proposed financing and acquisition, construction and operation of the City off-street parking facilities would constitute unconstitutional, illegal, wrongful, unfair and destructive competition; that the petition for prohibition was not intended to seek a determination of the merits of the controversy but merely to prevent consideration and determination thereof by the Circuit Court; that the petition raised no question of jurisdiction of the Circuit Court but merely one as to merits; that the statutes and court rules provide that issues of fact raised shall be determined as in other cases and in the county where the facts took place and that

> "to deny respondents such right would be to deny them the equal protection of the laws and to take their property without due process of law, contrary to said Fourteenth Amendment."

On April 6, 1954, the Court, without opinion, entered order denying the application for rehearing (R. 271).

By appellants' Circuit Court bill of complaint, their responses in the Supreme Court prohibition proceedings, and their application for rehearing, there was, in each instance, drawn into question the validity of a statute enacted by the Michigan legislature and of two ordinances enacted by the Common Council of the City of Detroit, on the ground of their repugnancy to the Fourteenth Amendment to the Constitution of the United States.[2]

---

[2] Each of such ordinances is a "statute" within the meaning of that term in 28 U. S. C. § 1257.

Jamison v. *State of Texas*, 318 U. S. 413, 63 S. Ct. 669, 87 L. ed. 869; *John P. King Manufacturing Company* v. *City Council of Augusta*, 277 U. S. 100, 114, 48 S. Ct. 489, 72 L. ed. 801, 810; *Beard* v. *City of Alexandria*, 341 U. S. 622, 71 S. Ct. 920, 95 L. ed. 1233.

In the instant case the Revenue Bond Act *requires* implementation by definitive ordinance.

The Supreme Court of Michigan having, nevertheless, upheld the validity of the Revenue Bond Act and of the ordinances, the Supreme Court of the United States has jurisdiction under 28 U. S. C. § 1257(2).

Winters v. *New York*, 333 U. S. 507, 68 S. Ct. 665, 92 L. Ed. 840.

According the Michigan Supreme Court the final word as to the interpretation of the act and ordinances, nevertheless their effect in relation to the federal constitution must be determined by the Supreme Court of the United States.

Crew Levick Company v. *Commonwealth of Pennsylvania*, 245 U. S. 292, 38 S. Ct. 126, 62 L. Ed. 295.

Despite the fact that the Supreme Court of Michigan, in its opinion,[3] made no reference to the federal questions raised by appellants and filed no written opinion in denying rehearing, the Court necessarily passed upon and decided the question of constitutionality of the act and of the ordinances, and disposition of the constitutional questions raised by appellants cannot be rested upon any adequate dispositive non-federal ground. In such circumstances, the Supreme Court of the United States has jurisdiction of an appeal from the resultant judgment.

Chicago, etc. R. Co. v. *Illinois*, 200 U. S. 561, 26 S. Ct. 341, 50 L. Ed. 596. A fortiori, the judgment appealed from herein expressly determined that the responses of the appellants were insufficient, and, consequently, the effect of the judgment was to deny the asserted claims of unconstitutionality and the opinion purports to grant declaratory relief which, necessarily, is predicated upon constitutionality of the act and ordinances.

---

[3] Pages 247-254, post.

BLEED THROUGH POOR COPY

In addition to the foregoing basis of jurisdiction of the Supreme Court of the United States, appellants contend that their appeal herein from the final judgment of the Supreme Court of Michigan properly presents, for review, the additional claims, prefaced in their responses and finalized in their application for rehearing, that the judgment denied appellants the right to equal protection of laws and due process of law, etc. under the federal constitution because of assumption of jurisdiction by the Supreme Court of Michigan and its refusal to afford a hearing, trial or determination of the issues of fact involved, and its decision that appellants had no right to litigate and that prior decisions were controlling, and because of the Court's refusal to determine the question as to tax exemption of the City's off-street garages and other facilities and its prohibition against procurement of such determination by appellants in the Circuit Court. We realize that this presents a question of mode and scope of review in the United States Supreme Court.

However, under the peculiar circumstances herein, we believe and contend that appellants are not, as to these additional questions, limited to application for certiorari under 28 U. S. C. § 1257(d), and, therefore, that all of the federal questions raised by them are reviewable by appeal. This belief and contention is based upon the fact that, in reality and in purpose, the petition for prohibition did not seek a trial of the issues of fact and law necessarily involved in appellants' claims, but only sought to bar appellants from obtaining a trial, hearing and determination of any thereof, solely on the claimed grounds that appellants had no right to litigate any of the questions and that all questions so raised by them had been foreclosed by prior decisions. The Supreme Court, against the opposing contentions of appellants, so held, and it is our view that such holding was, and of necessity had to be, predicated upon

the thesis that the Revenue Bond Act and the two ordinances were not repugnant to the federal Constitution, and that the prior decisions settled or should settle that question. In other words, it is our view that the constitutionality of the act and ordinances was necessarily drawn into question and decided by the prohibition judgment, and, therefore, in such aspect, the denials of the federal constitutional rights are reviewable by appeal. While these additional federal questions in no way affect the right of appeal under 28 U. S. C. § 1257(c), ante, they are, in any event, a proper basis of application for certiorari under § 1257(d) and subject to consideration by the Supreme Court of the United States under 28 U. S. C. § 2103.

V

Questions Are Substantial

The following are the grounds upon which appellants contend that the questions involved are substantial:

(a) Neither the State of Michigan nor the City of Detroit has any proprietary right, title or interest in the public streets nor the right to rent the same for the parking or storage of automobiles. Their sole right is that of reasonable regulation of the public use of the streets, under such police power as does not violate individual rights guaranteed by the Constitution of the United States. The situation is not changed by the fact that the City may acquire, own and operate off-street parking facilities, because that right also is exercisable only as a police power. Such right of reasonable regulation of the Detroit streets is greatly exceeded by the unreasonable and unlawful provisions of the two ordinances in question which commit the City, for more than 30 years, not only to continue on-street parking, but also to maintain, substantially undiminished, all present meters for on-street parking and also all other meters for

BLEED THROUGH POOR COPY

such parking hereafter installed, and to collect therefrom unreasonable and excessive profits and net revenues greatly in excess of the reasonable cost of such meter regulation, and additional sums, by increased rates if necessary, to be used for the acquisition, constructing, operation and maintenance of off-street garages and other parking facilities in unlawful, unfair and ruinous competition to appellants and in claimed violation of their rights of equal protection of the laws and due process of law under the Fourteenth Amendment to the Constitution of the United States. Implicit in such constitutional rights is the federal right to judicial determination as to the acts and conduct claimed to be in violation of said Amendment, and to appropriate protective relief if such claim be sustained.

Appellants set forth in their bill of complaint the facts and the provisions of law upon which they based their claim of unconstitutionality of the ordinances and statute. The bill of complaint was filed in the state trial court possessed of subject-matter jurisdiction and which promptly acquired jurisdiction of the defendants therein, appellees herein.

Over that litigation, the Supreme Court of Michigan had no jurisdiction other than as an appellate court upon an appeal from an order or decree of the Circuit Court, and, as to the constitutional questions thus raised, an adverse final judgment of the Supreme Court of Michigan would be reviewable by the United States Supreme Court. Such right of review is no less where the final judgment is entered by the Supreme Court of Michigan in an original proceeding which results in a judgment prohibiting the Circuit Court proceedings, on the ground that appellants had no litigible interest sufficient to raise the constitutional questions, or that such questions were without merit.

(b) Under the Constitution of Michigan the Circuit Court had original jurisdiction to hear, try and determine the issues raised in appellants' bill of complaint filed therein al-

leging the facts upon which appellants relied as showing that no necessity existed for the City's entry into the competitive off-street parking business; that the amount of collections by meters for on-street parking was excessive and was resulting and would continue to result in unlawful profit and net revenue; that because of described conditions in the City it was unreasonable and unlawful for the City to enter into the contract as to maintenance of street parking meters and collections and rates; that the City off-street parking facilities were not, and could not be, self-liquidating as required by the revenue bond act, and that the City illegally had exempted, and intended to continue to exempt, its off-street facilities from taxation. Nevertheless, at the instance of the defendants named in said bill of complaint, appellees here, and in a summary non-appellate proceeding, claimed by appellants to be beyond the jurisdiction of the Supreme Court of Michigan, that Court denied appellants the right to proceed in the Circuit Court and there to offer evidence as to the alleged facts upon which unconstitutionality of the ordinances and state statute were largely based, and also denied appellants a right to a hearing, trial and determination of such issues in the Supreme Court and also refused, itself, to determine the question as to tax exemption of the City off-street parking facilities involved, or to permit appellants to litigate that question elsewhere. The result is that the important and relevant issues of fact raised by appellants bearing on claimed unconstitutionality of the ordinances and statute have not been legally heard, tried or determined, but such trial, etc., as well as litigation of the question as to tax exemption, have been barred.

(c) The Supreme Court of Michigan had not previously heard or determined any of the questions presented by appellants in a case involving appellants or any other person financially, personally or peculiarly affected by the or any similar ordinance or by the revenue bond act, or who in any

manner would be affected by the competition contemplated thereby, nor, to our knowledge, has any of such questions been determined by the Supreme Court of the United States. Appellants are, as to the questions raised, the persons most directly, vitally, particularly and peculiarly interested and affected. Consequently, constitutional questions raised by appellants herein and in their bill of complaint, their responses in the Supreme Court of Michigan, and in their application for rehearing, are not frivolous or unsubstantial.

(d) The constitutional questions raised by appellants were necessarily drawn in question in the decision and judgment of the Supreme Court of Michigan, and the adverse decision thereof cannot be rested upon any adequate non-federal ground.

It is, therefore, respectfully submitted that the Supreme Court of the United States has jurisdiction of the appeal herein.

Dated May 18, 1954.

GEORGE E. BRAND,
GEORGE E. BRAND, JR.,
Attorneys for Appellants.

APPENDIX "A"

SUPREME COURT OF MICHIGAN

In the Matter of the Petition of the CITY OF DETROIT, a Municipal Corporation, JOHN H. WITHERSPOON, Controller of the City of Detroit, JAMES A. HOYE, Deputy Commissioner and Director of Traffic of the Police Department of the City of Detroit

OPINION—Filed February 18, 1954

Before the Entire Bench

BOYLES, *J.:*

The city of Detroit files here a petition for writs of prohibition and mandamus, to prevent the circuit judges in Wayne county, and the plaintiffs in a certain chancery case now pending in their court, from taking any further steps or proceedings in said case. We issued an order to said defendants to show cause why the petition should not be granted. Responses have been filed, briefs filed by the parties and by *amici curiae* by leave of court, and oral arguments heard.

The bill of complaint in said case was filed December 15, 1953, by the Service Parking Grounds, a Michigan corporation, and 15 other owners or operators of privately-owned automobile parking lots in Detroit, to obtain a declaratory decree holding that proceeds from parking meters for on-street automobile parking in Detroit cannot be legally combined with those from city-owned off-street parking facilities for bond financing; that money collected from street parking meters cannot legally be used for off-street parking facilities; that Detroit ordinances 672-E and 804-E, which provide for acquiring off-street parking facilities and for issuing revenue bonds to finance the same, are invalid; and to declare that off-street parking facilities cannot be legally exempted from taxation. (This final question is premature and does not require consideration now. But see CL 1948, § 141.161 [Stat. Ann. 1949 Rev. § 5.2426(1)].)

The bill of complaint further asks that the city be en-

joined from consummating the revenue bond financing for municipal off-street parking contemplated by the city, as provided for in said 2 city ordinances; from using money collected from street parking meters for municipal off-street parking facilities; and from using any surplus money from street parking meters to pay revenue bonds and interest.

No answer has been filed to said bill of complaint. On December 30, 1953, the city filed a motion to dismiss the case, which, however, has not been brought on for hearing. Instead, on January 11, 1954, the city filed in this Court the instant petition for a writ of prohibition to prevent further proceedings on said bill of complaint and for mandamus to require the circuit judges to dismiss the case. The controlling question is whether the bill of complaint sets up proper and sufficient grounds for the declaratory decree and the injunctive relief sought. The city claims that it has been filed purposely to delay the revenue bond financing.

Detroit is a home-rule city. By charter,* it has been authorized to acquire, establish, operate and maintain facilities for the parking of automobiles and to acquire the necessary land therefor. Such a provision in the city charter is authorized by the home-rule act, as follows:**

> "Each city may in its charter provide: * * *
>
> "(6) For the acquiring, establishment, operation, extension and maintenance of facilities for the storage and parking of vehicles within its corporate limits, including the fixing and collection of charges for services and use thereof on a public utility basis, and for such purpose to acquire by gift, purchase, condemnation or otherwise the land necessary therefor."

The city is also similarly authorized by the revenue bond act, as follows:***

> "Any public corporation is authorized to * * * acquire * * * 1 or more public improvements and to

---

* Detroit charter, title 3, ch. 1, § 12(v).

** CL 1948, § 117.4h (Stat. Ann. 1949 Rev. § 5.2081).

*** PA 1933, No. 94, as last amended by PA 1947, No. 204 (CL 1948, § 141.104 [Stat. Ann. 1949 Rev. § 5.2734]).

own, operate and maintain the same, within and/or without its corporate limits, and to furnish the services, facilities and commodities of any such public improvement to users within and/or without its corporate limits: • • •

"(d) No commercial enterprises, other than the parking or storage of motor vehicles, shall be conducted or authorized at or upon any automobile parking facility authorized under the provisions of this act.

"The powers in this act granted may be exercised notwithstanding no bonds are issued hereunder."

In 1947 the city adopted ordinance 213-E creating a municipal parking authority, to have general supervision over all municipally-owned facilities for parking and storage of motor vehicles. In 1948 the city adopted ordinance 236-E amending a previous ordinance and providing that the coins collected from parking meters be deposited in a special parking meter fund to be used for the cost of acquiring and installing parking meters, cost of supervision, inspection, maintenance, supply of parts, cost of collection, and enforcement of the ordinance. It further provided as follows:

"Any balance remaining after use of the funds as hereinbefore provided, shall be used, upon due appropriation by the common council, for the acquisition and installation of other traffic control devices and for the acquisition, construction and operation of off-street parking facilities."

In 1952 the city adopted ordinance 672-E. After reciting that the city was in urgent need of providing accessible off-street parking facilities to relieve congestion, the ordinance provided for acquiring off-street parking facilities. It further provided that parking facilities, both on-street and off-street, should be operated as a single automobile parking system, and for issuing revenue bonds to pay the cost of acquiring and maintaining off-street parking facilities. In 1953, effective December 10th, the city adopted ordinance 804-E, amending ordinance 672-E above referred

to. Essentially, it continued in effect the previous provisions authorizing the acquisition and operation of off-street parking facilities, the use of parking meter revenues and funds then or thereafter in the city treasury for those purposes, and the issuing of additional revenue bonds in the amount of $2,400,000 to pay for the cost of acquiring and making available for use the municipal off-street parking facilities therein referred to.

The plaintiffs, operators of privately-owned automobile parking lots, by their bill of complaint claim that the 2 city ordinances, 672-E and 804-E, above referred to are invalid and that the city does not have the right to acquire, operate and maintain off-street automobile parking facilities or to issue revenue bonds for that purpose. Succinctly stated in their bill of complaint, the plaintiffs' claim is as follows:

> "Under the circumstances, ordinances Nos. 672-E and 804-E illegally bind the city of Detroit to subsidize each and every of said off-street facilities out of the excess money being or to be collected by the on-street parking meters and to pay the deficiencies in maintenance, operation and taxes of each of said facilities and to pay the principal of, and interest on, the revenue bonds out of said meter money, and to maintain said meters and such charges as may become necessary to meet said deficiencies for 30 years or until all bonds and interest shall be paid in full regardless of the advisability of maintaining said meters upon the city streets and regardless of the expense of said regulation.
>
> • • •
>
> "The city of Detroit has no right or power to acquire, own, maintain or operate off-street automobile parking facilities, either as contemplated by said ordinances or otherwise."

Plaintiffs' claims have been answered in the negative by several decisions of this Court where the same questions were involved.

Automobile parking meters are a "public improvement" within the meaning of the revenue bond act, although not a "public utility." Control of and revenue from street parking meters may be legally combined with municipally-owned-and-operated off-street parking facilities within said act, for the purpose of financing by the issuance of revenue bonds. Money collected from street parking meters may be used for off-street municipally-owned parking facilities. The expenditure of public funds to acquire and operate off-street parking facilities involves public safety and is lawful. *Wayne Village President v. Wayne Village Clerk*, 323 Mich. 592. The minor variations between the instant situation and that in the *Wayne Village Case*, claimed by counsel for the plaintiffs, have no material bearing on the conclusions reached in that case.

Detroit city ordinances 672-E and 804-E, the legality of which is challenged by the plaintiffs in the chancery case, are copied from and are substantially the same as the ordinances considered by the Court in the *Wayne Village Case, supra*, and are the same ordinances which were under like attack and held valid by this Court in *Cleveland v. City of Detroit*, 324 Mich. 527. There is no merit in plaintiffs' present claim that the city cannot legally collect surplus or "profit" money from street parking meters, to be used to finance off-street parking facilities. *Wayne Village President v. Wayne Village Clerk, supra; Bowers v. City of Muskegon*, 305 Mich. 676. The question whether or not the parking facilities will be operated at a profit is an administrative problem for the legislature and the municipal authorities. It is not a matter primarily to be decided by the courts.

In their bill of complaint the parking lot owners have set up at length the value and extent of their properties, their dependency on profitable operation of their parking facilities, and their loss or damage if the city is allowed to enter into competition with their business by off-street automobile parking. They ask that the city be enjoined from acquiring and operating off-street parking facilities because of those facts and circumstances. They claim that Detroit lacks authority to engage in a public improvement, such as

automobile off-street parking, in competition with them, to their financial damage and loss. This Court has held to the contrary:

> "In the exercise of proprietary and business powers of a municipal corporation, it is governed by the same rules which control a private individual or a business corporation: in such case the fact that a city engaging in a commercial line of activity competes with and damages one of its inhabitants in his trade or business does not entitle him to relief against municipal action for the city owes him no immunity from competition." *Andrews v. City of South Haven* (syllabus), 187 Mich. 294.

The proviso in the revenue bond act hereinbefore quoted indicates that off-street parking is considered as a "commercial enterprise" which a municipality is authorized to acquire. In authorizing parking "without the corporate limits," it contemplates off-street parking. A municipality does not have city streets outside the corporate limits.

Counsel for the city claim that the writ of prohibition should issue because of the lack of proper parties plaintiff, seeking relief as taxpayers. Assuming that the plaintiffs by their bill of complaint are seeking injunctive relief against the city, *as taxpayers*, counsel for the city argue that the plaintiffs should be prohibited from maintaining their bill of complaint because, as taxpayers, they have no standing in court. Were this the only question involved, we would agree to granting the writ to compel dismissal of the bill of complaint on that ground, having recently so held in *Menendez v. City of Detroit*, 337 Mich. 476, and *Nichols v. State Administrative Board*, 338 Mich. 617.

However, it should be noted that the plaintiffs, in their bill of complaint, ask for a declaratory decree, to settle controlling questions of law; and counsel for the city likewise ask that we decide the merits of the questions raised here in order to have an early decision, because of the need for prompt relief of congested traffic and parking conditions in Detroit and to avoid any further delay in the issuance of revenue bonds. With that in mind, instead of taking a short cut by deciding the matter on the ground that the plaintiffs

have no standing in court, we have concluded to follow the method recently adopted in the *Nichols Case, supra,* and decide the merits of the questions raised.

The writs of prohibition and madamus will issue. No costs, a public question being involved.

EMERSON R. BOYLES,
GEORGE E. BUSHNELL,
HENRY M. BUTZEL,
LELAND W. CARR,
EDWARD M. SHARPE,
NEIL E. REID,
HARRY F. KELLY,
JOHN R. DETHMERS.

(6037)

PLEASE THROUGH POOR COPY